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No. 1513

IN THE

Supreme Court of the United States

AERO ENGINEERING CORPORATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI

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I.

OFFICIAL REPORTS

The Official Report (Decision and Order) of the National Labor Relations Board in this matter is found at 177 N.L.R.B. No. 31 and is reprinted in full in the Appendix hereto.

The Official Report (Per Curium Opinion) of the United States Court of Appeals for the Fifth Circuit is found at 433 F.2d 1311 (5th Cir., 1970). It and the Order denying the Petition for Rehearing (not yet officially reported) are reprinted in full in the Appendix hereto.

II.

JURISDICTIONAL GROUNDS

The date of the Judgment of the Fifth Circuit below was December 2, 1970. It was entered on December 24, 1970.

The Company's Petition for Rehearing was denied on February 16, 1971.

This Court has jurisdiction to review the Jundgment of the Court of Appeals by Writ of Certiorari pursuant to Title 28 U.S.C. § 1254.

III.

QUESTIONS FOR REVIEW

Question I: In a *Bernhard-Altman* fact situation (i.e., in the absence of a Board-conducted election and certification, an employer voluntarily recognizes a union, executes a recognition agreement, actually negotiates with the union, but without determining with the union whether or not the union did, in fact, represent a majority of the employees involved), was it appropriate for the Board to find that a presumption exists in favor of the Union's alleged majority status at the time recognition was extended? The Union admits that it never determined whether or not it had, in fact, been chosen by a majorty of the employees to act as their representative.

Question II: If this Court finds the presumption to have been valid, was it appropriate for the Board to refuse to permit the Company to introduce evidence attacking the Union's alleged majority status? The Company tendered the authorization cards, which the Union had gathered prior to its recognition, and other competent proof.

IV.

STATUTES

The issues presented in this Petition involve the Labor Management Relations Act, Title 29 U.S.C. § 141 *et seq.* The relevant Sections of the Act are § 157, which is reprinted in the Appendix and § 158(a)(5) and § 159(a) which are quoted at page 7 below.

V.

STATEMENT OF THE CASE

On August 8, 1967, a representative of Lodge 15, International Association of Machinists, AFL-CIO, requested recognition as bargaining representative for the employees of Aero Engineering Corporation. At that time he claimed to have possession of authorization cards signed by a majority of the Company's employees but declined to present the cards for examination as requested by the Company's President. Even though the cards were never examined or in any other way checked against an employee roll, the Company signed an agreement which provided, *inter alia*, that Lodge 15 was the bargaining representative of the Company's employees. On September 11, 1967, the Company signed a similar agreement with Lodge 1303, International Association of Machinists, AFL-CIO, again without proof of majority status, in the form of authorization cards or otherwise. There was no election or Board certification. Thereafter, the Company and Union settled an unfair labor practice charge on February 21, 1968, and they met in collective bargaining sessions on March 6, 21 and 27, May 29 and July 8, 1967. On August 5, 1967, the Company questoned the Union's alleged majority status and demanded to see the authorization cards. The Union admitted that it never determined whether a majority of the employees had, in fact, signed cards or in any other way designated the union as their bargaining agent.

The Fifth Circuit had jurisdiction of the enforcement proceedings below by virtue of Title 29 U.S.C. § 160(e).

VI.

ARGUMENT

The reason relied upon by the Company for the allowance of the Writ is that the decisions of the National Labor Relations Board and Fifth Circuit are in direct conflict with the Supreme Court's decisions in *NLRB* v. *International Ladies' Garment Workers Union (Bernhard-Altmann)*, 366 U.S. 731 (1961), and *NLRB* v. *Gissel Packing Company*, 395 U.S. 577 (1969). See Supreme Court Rule 19(1)(b). In *Bernhard-Altmann*, the Company signed a recognition agreement without examining the Union's authorization cards. Thereafter, negotiations culminated in the execution of a formal collective bargaining agreement. It was later determined that a majority of employees had not signed authorization cards at the time recognition was extended. Due to the absence of majority status at the time of recognition, the Supreme Court held that original recognition was invalid and all that followed, including the execution of a formal collective bargaining agreement, was void.[1] The basis for the Court's ruling was that the employees' right to choose whether or not to be represented by the Union was paramount. 366 U.S. at 738.

The Board has followed the teachings of *Bernhard-Altmann* in a series of decisions, one of which was *Josephine Furniture Company*, 172 NLRB No. 22 (1968).[2] In *Jose-*

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[1] The settlement agreement in our case is entitled to no greater dignity than the formal Union contract which was declared void in *Bernhard-Altmann*.

[2] It is well established that *Bernhard-Altmann* applies without regard to whether the issue of majority status is raised in an election proceeding or unfair labor practice proceedings. *Keller Plastic Eastern, Inc.*, 157 N.L.R.B. 583 (1966); *Sound Contractor's Association*, 162 N.L.R.B. No. 45 (1966).

phine Furniture Company, the employer signed a recognition agreement, negotiated for several months and then questioned the Union's majority status. Citing the line of cases which evolved from and relied upon *Bernard-Altmann,* the Board held that because "It does not affirmatively appear that the (Union) had demonstrated its majority prior to the granting of recognition" the relationship was not enforcible. Yet one month later in the hearing before the Trial Examiner in this matter, the Board held that the Union was not required to "affirmatively demonstrate" its majority but that a presumption of majority status existed in favor of the Union. Moreover, the Board made the astonishing ruling that the Company could not introduce the authorization cards (which the Union had gathered during its organization drive and which were the basis for the Union's claim to represent the employees) in order to rebut the presumption.[3] The Fifth Circuit enforced the Board's order.

The Fifth Circuit's and the Board's decisions herein have reversed existing National Labor Policy as announced by the Supreme Court in *Bernhard-Altmann.* Firstly, it is inconsistent with the holding of *Bernhard-Altmann* (and with the Board's own logical extension of *Bernhard-Altmann* in *Josephine Furniture Company, supra*) to create a presump-

[3] In addition to the authorization cards, the Company sought to introduce evidence through Union representatives, through Company officials who would testify that they were denied an opportunity to examine the authorization cards, through witnesses who would testify that the employees did not want the Union to represent them, and through introduction of the prior recognition agreement with Lodge 15 which constituted a contract bar. The prior recognition agreement contained terms and condition of employment as well as a recognition clause. The Company also tendered testimony that the employees had not authorized the change from Lodge 15 to Local 1303. The Board will not permit a change in locals without proof of employee approval. *Associated General Contractors,* 182 NLRB No. 29 (1970).

tion of majority status in favor of a Union which admits that it never determined, through a card check or otherwise, whether or not a majority of the employees had, in fact, authorized the Union to represent them. Secondly, assuming, *arguendo,* that the presumption was valid, it was clear error for the Board to prevent the Company from introducing evidence in the form of the authorization cards and other evidence, to rebut the presumption.[4]

In *Bernhard-Altmann* the Union argued that the Company's and Union's "good faith belief" concerning the Union's majority status was controlling. The Supreme Court held that

> "To countenance such an excuse would place in permissably careless employer and Union hands the power to completely frustrate employee realization of the premise of the Act — that its prohibitions will go far to assure freedom of choice and majority rule in employee selection of representatives."

With this statement of the Supreme Court's feeling about such cases, it is unbelievable to find the Board creating a presumption in favor of a Union which admits that it has never determined whether or not a majority of the employees did, in fact, authorize it to act as their bargaining agent. The Board's ruling makes possible, even probable, the installation of a minority Union — the result flatly condemned in *Bernhard-Altmann.* To paraphrase the Supreme Court's holding, we say that

> "To engage in such presumptions without proof of employee choice would place in permissable careless

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[4] The Board's decision herein inaccurately states that the Company did not attempt to introduce evidence to rebut the presumption. The Company tendered the authorization cards and other evidence referred to in Footnote 3, *supra,* but the Trial Examiner refused to accept it.

> or unscrupulous employer and Union hands the power to completely frustrate employee realization of the premise of the Act."

Bernhard-Altmann is not the only authority which defies the Board's presumption. The Labor Management Relations Act, § 158(a)(5), provides that

> "It shall be an unfair labor practice for an employer . . . . . to refuse to bargain collectively with the representatives of his employees, subject to the provisions of §159(a)."

§159(a) provides that

> "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all of the employees in such unit for the purposes of collective bargaining. . . . ."

By incorporating the language of §159(a) into §158(a)(5), the United States Congress intended that an employer could be found guilty of a violation of §158(a)(5) if the "representative" was one which was "designated or selected . . . . . by a majority of the employees." The Supreme Court has recently stated the same logical progression in *NLRB* v. *Gissel Packing Company*, 395 U.S. 577, 596 (1969). The Court added that

> "An employer has a duty to bargain whenever the Union representative presented 'CONVINCING EVIDENCE OF MAJORITY SUPPORT' . . . . it was recognized that a Union did not have to be certified as a winner of a Board election to invoke the bargaining obligation; it could establish majority status by other means under the unfair labor practice provisions of §158(a)(5) — BY SHOWING CONVINCING SUP-

> PORT, for instance by a Union-called strike or strike vote, or, as here, by possession of cards signed by a majority of the employees authorizing the Union to represent them for collective bargaining purposes." (395 U.S. at 596). (Emphasis supplied.)

There is no such evidence of "convincing support" in this record. At best there is an indication that the Union and the Company *thought* the Union had its alleged majority. *Bernhard-Altmann* (366 U.S. at 739) and *Gissel* (395 U.S. at 596, footnote 8) state flatly that in these cases, employer and Union "good faith" beliefs and doubts are totally irrelevant. It is simply a question of whether or not the employees have, *in fact*, authorized the representation.

There is no evidence of the type demanded in Gissel (i.e., convincing evidence of majority support) to sustain a finding that the Company violated § 158(a)(5). Accordingly, the creation of this new presumption in the absence of such facts is insupportable.

Moreover, the Board's refusal to permit the Company to introduce the authorization cards and other valid evidence to rebut the presumption is a clear abridgement of the Company's constitutional right to due process and makes a mockery of the Supreme Court's holding in *Bernhard-Altmann*. Remember, in *Bernhard-Altmann* the authorization cards were the basis upon which the Supreme Court declared the relationship illegal and void. In light of *Bernhard-Altmann*, how can the Board and the Fifth Circuit conceivably contend that the Company cannot introduce the authorization cards which were the basis for the Union's claim to represent the employees in the first instance. It is simply incredible.

That the Board has overruled *Bernhard-Altmann* through a procedural gimmick is made amply clear by a statement of the Trial Examiner. Counsel for the Company complained bitterly that "the ruling of the Trial Examiner has made it impossible for us to develop facts which will bring us squarely within the holding of *Bernhard-Altmann.*" The Trial Examiner said "I quite agree with you Mr. Carroll."

IX.

CONCLUSION AND PRAYER

The question is: Why should the Court grant this Petition? The answer is that ten years ago the Supreme Court granted a writ in *Bernhard-Altmann,* because it considered the issue to be extremely important. Surely today there is no more vital issue in the area of labor relations than whether or not a Union has the right to represent the employees involved. Until that question is answered affirmatively on the basis of "convincing evidence of majority employee support", the Union has no right, the employer has no obligation, and perhaps most importantly the employees remain free to choose this union or that union or no union at all.

The future consequences of the Board's new presumption are also significant. If permitted to stand, the new presumption will encourage unions to accept representative status without first determining whether or not they have, in fact, been selected by the employees involved — a situation which the Supreme Court abhored in *Bernhard-Altmann.* 366 U.S. at 739. We do not share the Board's apprehension that to require proof of the Union's alleged major-

ity status at this stage would impede the progress of collective bargaining. In fact, the Supreme Court in *Bernhard-Altmann* summarily rejected an identical argument. 366 U.S. at 739. There is certainly no unfairness in requiring the Union to present the cards at this stage, because the cards were the basis for the Union's claims to represent the employees initially. What harm is there in requiring the Union to show the cards? Once the cards are presented, the matter would be closed forever. On the other hand, requiring the Union to produce the cards guarantees protection to the vulnerable third party, i.e., the employees. The Union's refusal to present the cards convinces us that it did not have its majority. Why else would it refuse to present them? And why should this Court permit the adoption of a presumption which can lead to such an unjust result?

In any event, the Board's refusal to permit the Company to introduce the authorization cards and other evidence to rebut the presumption is indefensible.

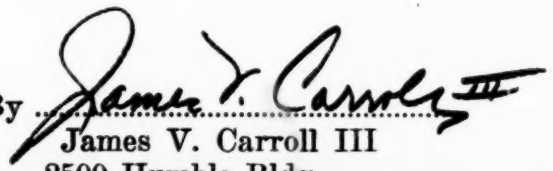
In summary, the Board's decision overturns thirty-five years of National Labor Policy, obliterates the holding and underlying principles of the Supreme Court's decisions in *Bernhard-Altmann* and *Gissel* and encourages the deprivation of employee free choice in selection of representatives. Our case is truly worthy of this Honorable Court's consideration.

WHEREFORE, PREMISES CONSIDERED, Aero Engineering Corporations prays that its Petition for Writ of Certiorari be granted and that upon hearing an argu-

ment, the Board's application for enforcement be denied in all respects.

Respectfully submitted,

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APPENDIX

177 NLRB No. 31

(Heading omitted.)

DECISION AND ORDER

On December 20, 1968, Trial Examiner Lloyd Buchanan issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices alleged in the complaint and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has considered the Trial Examiner's Decision, the exceptions and brief, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner as detailed hereinafter.

As noted in the Trial Examiner's Decision, evidence was adduced that on August 8 or 9, 1967, the Union exhibited to the Company a number of authorzation cards it claimed were signed by a majority of employees in an appropriate unit. Thereafter, on September 11, 1967, the Company signed a recognition agreement according the Union recognition as the sole collective bargaining agent for the employees of this unit and the Union requested

bargaining. The record facts, which were largely stipulated, does not disclose what transpired immediately after the demand for bargaining but presumably no bargaining of consequence transpired, and thereafter on January 23, 1968, the Union filed a charge in Case 23-CA-2940 alleging a refusal to bargain. Pursuant to a settlement agreement approved by the Regional Director on February 21, 1968, the Company and the Union met in collective-bargaining sessions on March 6, 21, and 27, May 29, and July 8, 1968. On August 1, 1968, the Company questioned the appropriateness of the unit claiming that its merger with the American Power Stage Company made a single plant unit inappropriate, and on August 5 it refused to bargain. Thereafter, the Company also questioned whether the Union represented a majority of employees.

Relying on the Board's desision in *Josephine Furniture Company,* 172 NLRB No. 22, Respondent contends that the Union never affirmatively established that it represented a majority of employees in an appropriate unit when it recognized the Union on September 11, 1967, and that the Union through the auspices of the General Counsel, must now establish that fact as a prerequisite to any finding of a refusal to bargain here.

The Trial Examiner rejected Respondent's contention, concluding that the facts here were distinguishable, and that therefore the principle expressed in *Josephine Furniture* is not applicable here. We agree.

Like the Trial Examiner, we conclude that the single plant unit originally recognized and bargained for is an approprate unit. The only remaining issue concerns the Union's majority status, and whether the General Counsel must now affirmatively demonstrate the Union's majority either at the time of the original recognition on September

11, 1967, or as of the refusal to bargain on August 5, 1968. We conclude that in these circumstances such demonstration is not required.

While we recognize that invoking a doctrine of waiver or laches is not normally applicable to the question of majority status, we are persuaded from a legal as well as a policy standpoint, that to permit an Employer to raise a belated challenge to the Union's majority some 11 months after granting recognition and subsequent to a settlement agreement, would be an unstabilizing factor in bargaining, would unnecessarily undermine the settlement agreement previously reached, and would constitute an inducement to "gamesmanship" which would not effectuate the policies of the Act. In sum, therefore, we find that by Respondent's recognition of the Union, its execution of a settlement agreement in which it agreed to bargain with the Union, and its subsequent actual bargaining with the Union, that the Union has established a presumption of majority.[1] Respondent did not rebut that presumption. In fact, Respondent candidly conceded at the hearing that, apart from the reasons previously stated, it had no reason or evidence for now challenging the Union's majority.

We conclude, therefore, that having failed to rebut the Union's presumption of majority, the Respondent's refusal

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[1] This did not foreclose the Respondent from proving that the Union did not in fact represent a majority at the time of its original recognition on September 11, 1967. Here the Respondent is contending that some 11 months after its original recognition, the Union must now affirmatively demonstrate its majority. For the reasons previously stated, we find that the burden of proceeding has shifted to the Respondent.

to bargain is violative of Section 8(a)(5) and (1) of the Act.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner, and orders that the Respondent, Aero Engineering Corporation, Houston, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

Dated, Washington, D.C. June 30, 1969.

.....
John H. Fanning, Member

.....
Gerald A. Brown, Member

.....
Howard Jenkins, Jr., Member

NATIONAL LABOR
RELATIONS BOARD

(SEAL)

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[2] Member Brown agrees that Respondent violated Section 8(a)(5) of the Act: Respondent, by executing a settlement agreement, which acknowledged an obligation to bargain with the Union, assumed an obligation to bargain for a reasonable period of time thereafter within which to conclude a contract; and, in the circumstances herein, Respondent did not fulfill this bargaining obligation.

(Heading omitted.)

Application for Enforcement of an Order of the National Labor Relations Board (Texas Case)

(December 2, 1970)

Before JONES, GEWIN and CLARK,
Circuit Judges.

PER CURIAM: The National Labor Relations Board made findings that the respondent, Aero Engineering Corporation, was in violation of Sections 8(a)(5) and (1) of the National Labor Relations Act for refusing to bargain with a union which it found to represent a group of the respondent's employees. The Board entered an order directing the respondent to cease and desist from violations of the Act, to bargain when requested, and to post appropriate notices. The Board seeks enforcement of its order. There is substantial evidence on the record as a whole to sustain the Board's findings and the law requires that its order be enforced. A discussion of the facts and of the pertinent law would not serve as an aid to the decision of future controversies. The order of the Board will be ENFORCED.

(Heading omitted.)

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion Dec. 2, 1970, 5 Cir., 1970, ... F.2d .....).

(February 16, 1971)

Before JONES, GEWIN and CLARK,
Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

LABOR MANAGEMENT RELATIONS ACT

"Section 157. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities. . . ."